93-1776

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

GORDON L. HALL, et al.,

Petitioners,

v.

VAL JOHN GREEN,

Respondent.

and

UNITED STATES OF AMERICA,

Respondent.

RESPONDENT VAL JOHN GREEN'S BRIEF IN OPPOSITION

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May 31, 1994

QUESTIONS PRESENTED

1. Whether, during a weekend of inactive duty training, Army reservists who are injured in a traffic accident while off-post on a personal excursion of their own — on their own free time, in a private automobile, and not under orders — may be considered as injured in a "line of duty" status for purposes of peace time disability compensation, but at the same time, their injuries are not "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," and thus tort liability for their injuries is not subject to the intramilitary immunity derived from the *Feres* doctrine?

2. Whether the *Feres* doctrine should be overruled as plain error because it is unlawful, court-made legislation which unfairly extends an intramilitary immunity from tort liability to the peace time, non-combatant activities of servicemen?

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STATEMENT OF THE CASE

The following facts attend the traffic accident which befell the plaintiff-respondent. They are taken verbatim from the opinion of the Magistrate issued after a hearing on cross-motions for summary judgment with respect to the applicability, or not, of *Feres v. United States*, 340 U.S. 135 (1950).

BACKGROUND

> Plaintiff Green and decedent Coffman were both sergeants in the United States Army Reserve assigned to a Special Forces Group in Portland, Oregon. On the evening of Friday, July 7, 1989, they went to the Portland Air Base for a weekend of inactive duty training. They left the base on a training exercise and returned to the base at approximately 3:00a.m. the following morning, Saturday, July 8, 1989. They and the rest of their company were then allowed either to leave or remain on the base until the first formation at 9:00 or 9:30 a.m. Green and Coffman chose to remain on the base.
>
> Though it is impossible to reconstruct their movements or intentions that morning with confidence, it appears that the two awoke between 6:00 a.m. and 6:30 a.m. Green, Coffman, and Sergeant McMahan, another member of the same company, left the base at approximately 7:00 a.m. According to McMahan's affidavit, the three decided to leave the base to eat breakfast, preferring to eat at a restaurant rather than eat the "meals ready to eat" provided to those who stayed. McMahan added that Green and Coffman told him that they had to go to Green's house to pick up some unspecified training materials to be used later that day. McMahan also said that he, Green, and Coffman agreed to bring

back donuts for team members who stayed on the base. McMahan left the base in his own vehicle a few minutes after Green and Coffman had left together. After failing to find Green and Coffman, he ate alone and returned to the base.

There is some evidence that Green and Coffman returned to the base and left again. Master Sergeant Steven Lucas, also a member of the Special Forces Group, stated in his affidavit that he saw the two leaving the team room between 8:30 and 8:40 a.m. At any rate, it is clear that the two left the base in a 1988 Buick driven by Coffman, and owned by Eastman Kodak Company, Coffman's employer. At approximately 8:45 a.m., that automobile collided with a truck owned by the Salvation Army at the intersection of N.E. Lombard and N.E. Martin Luther King Boulevard. Coffman's vehicle was westbound, headed away from the base, and not on the most direct path to Green's residence at 2915 S.E. 35th Place, at the time of the collision. Coffman died, and Green suffered serious injuries. Neither donuts nor training notes or other service-related materials or equipment were found in Coffman's automobile (Pet. App. pp. A-30 to A-32). (Footnotes omitted.)

In point of fact, the Court of Appeals more precisely found,

...Coffman's car was headed west, away from the base, two blocks shy of Mary Jane's Coffee Shop, one of three places the Reservists had agreed to try for breakfast. The car was on one of several possible routes from the base to Green's house, although they had passed faster routes . . . . (Pet. App., p. A-45).

See the Map at A-1.

COMMENT

Petitioner first raised its question number one at oral argument before the Ninth Circuit Court of Appeals. The issue is not properly preserved for review by this court, and respondent objects to its submission.

The Court should also notice that petitioner's argument strains the facts when it contends that respondent went off-post to "go to breakfast because there are no mess facilities on base," Pet. Br., p. 11. They had rations on base. Pet. App., pp. A-31, A-44.

SUMMARY OF ARGUMENTS

This brief examines the difference in amplitude between the broad compass of a "line of duty" determination for peace time disability coverage for reservists on inactive duty for training and the less embrasive compass of activities which are deemed to be"incident to service" under the *Feres* doctrine. The still more limited realm of course and scope of employment is not visited in this brief.

A "line of duty" determination for purposes of peace time disability compensation for reservists is generous in scope. Reservists are covered by compensation "while travelling to or from authorized training or duty." AR 600-8-1 §39-2(c)(7). Pet. App., pp. A-59 to A-60.

Furthermore, a reservist's off-post excursion in a private vehicle on his own free time and not while under orders, whether to get donuts or to retrieve forgotten training materials, is a reservist's personal preparation for military activity, but it is not military activity itself. It is "incident to service" only "in the sense that all human events depend upon what has already transpired." *Brooks v. United States*, 337 U.S. 49, 52 (1949).

If the *Feres* doctrine were to preclude civil tort liability in this case, then, once again, that court-made legislation will do a grave injustice to our servicemen. The doctrine is judicial legislation which creates a sizeable enclave of tort immunity within the ambit of the Federal Tort Claims Act with respect to a serviceman's noncombatant activities in peace time.

REASONS FOR DENYING THE WRIT

1. The "Distinctly Nonmilitary Act" of Respondent's Off-Post Excursion Is Outside the Scope of the *Feres* Doctrine.

The slender thread of petitioner's argument in favor of the writ is the line of duty determination of respondent's and petitioner's decedent's eligibility as reservists on inactive duty for training for peace time disability compensation. Petitioner states,

> The line-of-duty test is more limited than the incident to service test. The issue of whether a serviceman was acting within the line-of-duty does not even arise unless his status at the time is incident to service. Pet. Br., p. 6.

But in a footnote, petitioner contradicts this notion altogether. Petitioner quotes from Army Regulation (AR) 600-8-1 §39-2(c)(7), which provides for a line of duty determination for "injury or death of a USAR or ARNG member while traveling to or from authorized training or duty." 10 U.S.C. §1202; 38 U.S.C. §§ 101(16), 105(1); *Merritt v. United States*, 332 F.2d 397, 398 (1st Cir. 1964).

In this case, the commuter activity is entirely civilian in character. Two reservists, off-post on their own free time and not under orders, driving a civilian car to buy donuts or to retrieve forgotten

training materials, is activity which is simply preparatory to military service, and not military activity itself. It is an activity which is "incident to service" only "in the sense that all human events depend upon what has already transpired." *Brooks v. United States*, 337 U.S. 49, 52 (1950). Even though in the line of duty for peace time disability compensation, AR 600-8-1 §39-2(c)(7), respondent's and petitioner's decedent's activities at the time of the accident were "distinctly nonmilitary acts," *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1487 (9th Cir. 1991), and thus their serious injuries are not injuries which "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950).

They did not lose their valuable right to civil recourse merely because they were in uniform at the time of the collision. *Durant v. Neneman*, 884 F.2d 1350, 1354 (10th Cir. 1989).

2. The *Feres* Doctrine Should Be Overruled As Court-Made Legislation Which Unfairly Deprives Servicemen of Their Civil Right to Recourse for Wrong Done to Their Person.

A. The Judicial Origin Of The *Feres* Doctrine

In 1946, Congress dissolved the barrier of sovereign immunity with the passage of the Federal Tort Claims Act, 28 U.S.C. §§1346 and 2641 et seq. which renders the government liable in tort:

> [U]nder circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §1346(b).

Congress enacted an exception to the FTCA's "sweeping" waiver of immunity, *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1950), with respect to military activity, excluding "[a]ny claim arising out of the *combatant activities of the military . . . during time of war.*" 28 U.S.C. §2680(j) (Emphasis added).

The FTCA's "combatant activities" exception was first construed by the Supreme Court in *Brooks v. United States,* 337 U.S. 49 (1949). There, an Army truck driven by a civilian, negligently struck two off-duty servicemen riding in their own vehicle on a public highway, killing one serviceman and seriously injuring the other.

The court held that it would be "absurd" not to believe the "any claim" language of the FTCA meant "any claim but that of a serviceman." *Id.* at 51. Turning to the "combatant activities" exception, the court stated:

> The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. *Brooks v. United States*, supra, 337 U.S. at 52.

Despite the plain meaning of Congress' words in the "combatant activities" exception to the FTCA, ordinarily regarded as conclusive upon the court's construction, *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 99 (1991); and despite the rule of construction that express mention of an exception impliedly excludes other exceptions, *Andrews v. Glover Const. Co.*, 446 U.S. 608, 616-

17 (1980); the Court created an exception to the FTCA which includes all manner of peace time, noncombatant activities which "arise out of or are in the course of activity incident to service," *Feres v. United States*, 340 U.S. 135, 146 (1950), thus creating a sizeable enclave of tort immunity within the body of the FTCA.

Known as the *Feres* doctrine, it is now subject to "widespread almost universal criticism." *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D. NY 1980). According to the four dissenting Justices in *United States v. Johnson*, 481 U.S. 699, 700 (1987), "*Feres* was wrongly decided" and the court should "limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has had." *Id.*, 481 U.S. at 703. *See, also, Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1990):

> It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*, . . . seemingly manacled by precedent, this Circuit has repeatedly expressed its strong reservations before ultimately overcoming them. . . .

B. *Feres* Is Judicial Legislation

The only military exception to the government's liability to servicemen "under circumstances where the United States, if a private person, would be liable," 28 U.S.C. §1346(b), is found in 28 U.S.C. §2680(j): "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

The *Feres* Court, however, created a noncombatant, peace time bar to servicemen's claims against the government, and later, by Circuit pronouncement, between the servicemen themselves. *Lutz v. Secretary of the Air Force, supra*, 944 F.2d at 1480-81.

By what authority did the *Feres* Court create this exception to tort liability -- so clearly in conflict with the "sweeping" waiver of governmental immunity, *United States v. Yellow Cab Co., supra,* 340 U.S. at 547 -- and enact by judicial fiat a broad immunity from tort liability for servicemen engaged in noncombatant, peace time activities? Congress itself *expressly limited* that immunity to "combatant activities . . . during time of war." 28 U.S.C. §2680(j). The *Feres* doctrine is not just filling a gap left by Congress' silence, it is "rewriting rules that Congress has affirmatively and specifically enacted." *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

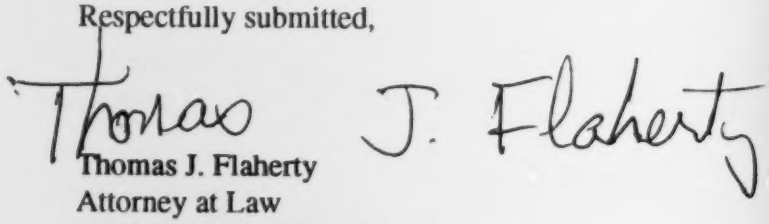
> Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. *United States v. Rutherford,* 442 U.S. 544, 555 (1979). (Citations omitted).

Accordingly, the creation vel non of an intramilitary immunity from tort liability belongs to Congress in the first instance. The *Feres* doctrine should be overruled as plain error.

CONCLUSION

The writ should be denied because this is not a *Feres* case. The injury producing activity was "distinctly nonmilitary" in character, being the indubitable equivalent of a civilian traffic accident. If this were a *Feres* case, the court should then overrule *Feres* as an undue judicial encroachment upon the FTCA's express limitation of tort immunity in the military sphere to "combatant activities . . . during time of war."

Respectfully submitted,



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May 31, 1994

APPENDIX

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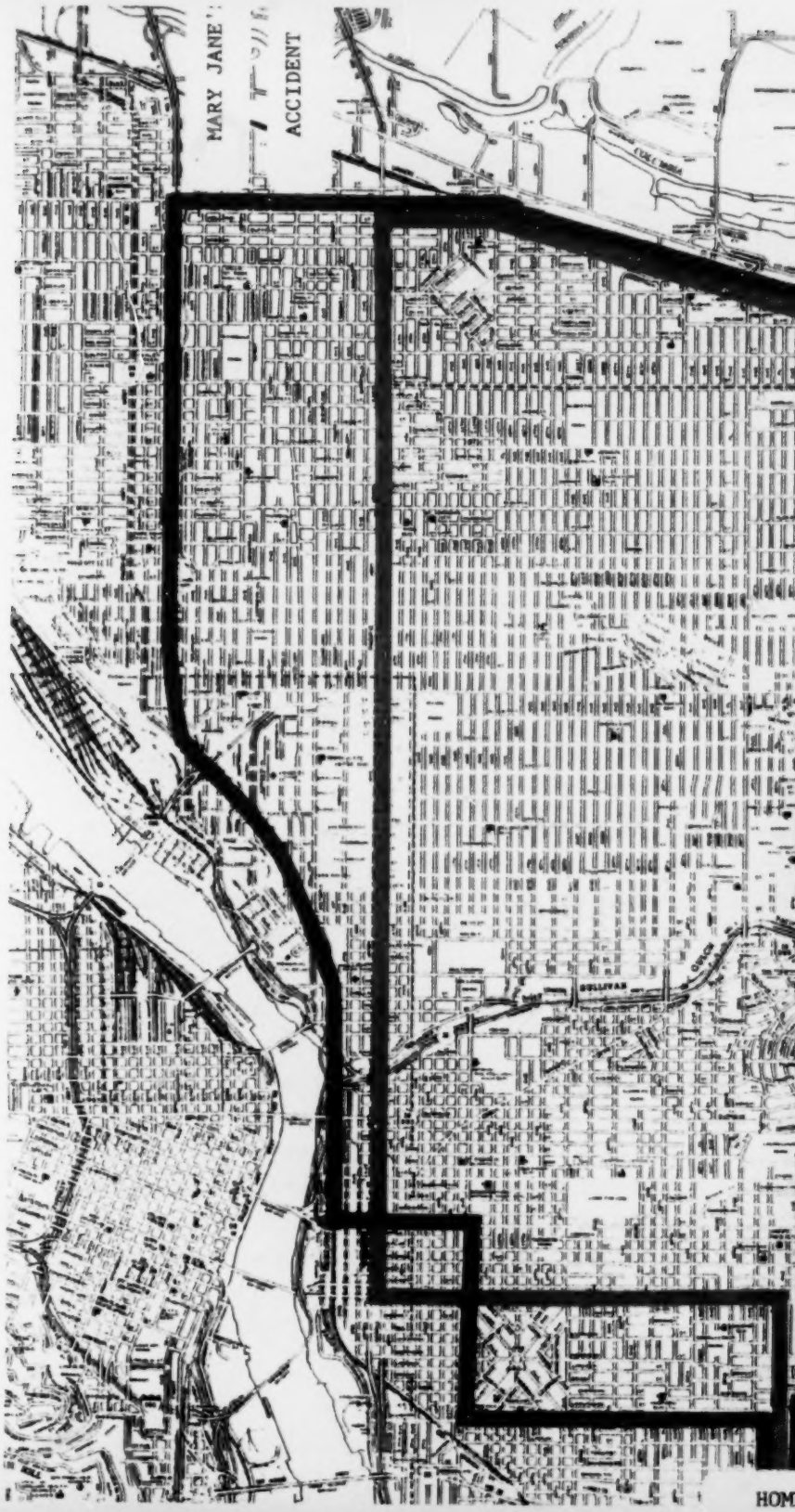

BASE
36 MINS.
37 MINS.
42 MINS.
46 MINS.
MAYWOOD
PARK

STATUTES

10 U.S.C. §1202. **Regulars and members on active duty for more than 30 days: temporary disability retired list**

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title) for a period of more than 30 days, would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature, the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the temporary disability retired list, with retired pay computed under section 1401 of this title.

38 U.S.C. §101. **Definitions**

(16) The term "service-connected" means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

38 U.S.C. §105. **Line of duty and misconduct**

(a) An injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty and not the result of the veteran's own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs.